IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 334 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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HARIJAN KANJIBHAI MADHABHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 334 of 1993
MR DF AMIN for Petitioner No. 1-2
MR KG SHETH, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 24/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. By filing this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973, the appellants have challenged legality of judgment dated 25/1/1993 rendered by the Ld. Addl. Sessions Judge, Mehsana in Sessions Case No. 34/1988 by which they are convicted of the offences punishable under Sections 302 and 307 read with sections 114 and 34 of the Indian Penal Code as well as section 135 (1) of the Bombay Police Act, 1951 and punished with rigorous imprisonment for life for the offences punishable under sections 302 and 307 read with section 114 and 34 of the Indian Penal Code and fine of Rs.200/-, in default simple imprisonment for seven days as well as imprisonment till rising of the Court and fine of Rs.200/-, in default SI for seven days for the offence punishable under Section 135(1) of the Bombay Police Act, 1951.

2. Briefly stated the prosecution case is as under. Deceased Vashrambhai Nathabhai Chamar was resident of village Vaghrol, Taluka Sidhdhpur, District Mehsana . He had an agricultural field known as Dhedhvada situated in the sim of village Vaghrol and the field was admeasuring about one and half Vigha and he was pursuing agricultural operations. He had four sons, namely (1) Kalubhai Vashrambhai, (2) Valabhai Vashrambhai, (3) Govabhai Vashrambhai and (4) Galalbhai Vashrambhai. Govabhai had died before the incident in question took place, whereas Galalbhai had left house of the deceased long back.

The appellant no. 1 i.e. Kanajibhai Madhabhai is nephew of the deceased, whereas the appellant no. 2 is the son of the appellant no.1 and original accused no. 3 Amariben is wife of nephew of the appellant no.1. The field of the appellant no. 1 is situated near the field of the deceased.

The incident in question took place on November 22, 1987 at about 8.45 a.m. The deceased had divided the field amongst his sons and himself. A sloping water course for watering crops grown in the field of Kalubhai who is son of the deceased was made and was passing near the boundary of the field of the appellant no.1. The appellant no. 1 had breached the said sloping water course and, therefore, the deceased and his sons had made another sloping water course from the field of one Husenbhai and were watering crops grown in their fields. From the said sloping water course, the appellants were also deriving water for the crops grown in their fields. On the date of incident original accused no. 3 Amariben breached the sloping water course made from the field of

Husenbhai and had diverted water towards the fields of the appellants. Therefore, Dharmaben, who is wife of Kalubhai, told the original accused no.3 that the water was needed for the crops grown in the field of deceased and the water should not have been diverted by the accused no.3 towards the fields of the appellants. So saying Dharmaben had attempted to plug the breach and at that time original accused no. 3 Amariben had given blow with a shovel on waist of Dharmaben. Original accused no. 3 had tried to inflict another blow with shovel on Dharmaben and when Dharmaben tried to ward off the same, she received injuries on fingers of left hand. On assault being mounted by original accused no.3 Amariben, Dharmaben had started running towards the field of Valabhai and had raised shouts. On shouts being heard Valabhai had come to her rescue and found that the appellants were also chasing Dharmaben and at that time the appellant no. 1 had an axe with him, whereas the appellant no. 2 had a stick with him and juvenile offender Rameshbhai has also a stick with him. As Valabhai tried to rescue Dharmaben, the appellant no. 1 caused an injury on head of Valabhai by means of axe, whereas the appellant no. 2 caused an injury on right hand of Valabhai by means of his stick and juvenile accused Rameshbhai caused injury on left hand of Valabhai by means of his stick. As Valabhai was assaulted by the appellants and juvenile accused, his father deceased Vashrambhai Nathaji tried to rescue his son. Therefore, the appellant no. 1 gave a blow with blunt portion of axe on head of deceased Vashrambhai Nathabhai, whereas the appellant no. 2 gave a stick blow on the head of the deceased Vashrambhai Nathaji. Because of the injuries sustained, deceased Vashrambhai died on the spot. Thereafter, Babubhai, who is son of Kalubhai informed Kalubhai who was then working in the field of one Daud Jalad about the incident in question. On learning about the incident, Kalubhai reached the field of the deceased and found that several persons had collected there. On examination he found that his father had expired, whereas his wife Dharmaben, his brother Valabhai and his nephew Pravinbhai were injured. Valabhai Vashrambhai was removed to Government Dispensary, Kakoshi in a tractor, but doctor had refused to treat Valabhai as the police was not informed about the incident. Kalubhai had therefore lodged complaint at Kakoshi Police Station against the appellants which was registered by Police Officer incharge of the police station. Dharmaben who is wife of Kalubhai as well as Pravinbhai, who is nephew of Kalubhai and Valabhai Vashrambhai were initially treated at the Government dispensary Kakoshi, wherefrom they were referred to Sidhdhpur Municipal Hospital for further

treatment. At Sidhdhpur Municipal Hospital it was found that Valabhai Vashrambhai had sustained serious injuries and, therefore, he was removed to Ahmedabad Civil Hospital for better treatment by experts. At Ahmedabad Civil Hospital Valabhai Vashrambhai was initially treated by Dr. Satish Madhusudan Pandya and Dr. Pandya had referred Valabhai for further treatment to Orthopaedic ward. After initial treatment at Orthopaedic ward, Valabhai Vashrambhai was referred to Neuro Surgery Department of the hospital and was treated there by Dr. Dipakkumar D. Patel. Valabhai Vashrambhai was discharged from hospital on December 5, 1987. Meanwhile the complaint which was lodged by Kalubhai was initially investigated by Second Police Sub Inspector Mr. G.V. Gohil of Kakoshi Police Station and thereafter by Mr. P.J. Choudhari, who was Senior P.S.I. of Kakoshi Police Station. The Investigating Officer had held inquest on the dead body and made arrangement for sending the dead body for post mortem examination. The post mortem examination was made by Dr. Rajesh Vrajlal Shah, who was then Medical Officer of Sidhdhpur Municipal Hospital. During the course of investigation the appellants and other accused were arrested and weapons used in the commission of crime as well as other incriminating articles were discovered pursuant to voluntary disclosure made by the accused and seized under different panchnamas which were prepared in the presence of independent witnesses. On conclusion of investigation the case against juvenile offender was separated, whereas the appellants and original accused no. 3 were charge-sheeted in the Court of Ld. Judicial Magistrate First Class, Sidhdhpur of the offences punishable under sections 302, 307, 114 and 34 of the Indian Penal Code as well as section 135 (1) of the Bombay Police Act, 1951. As the offences punishable under sections 302 and 307 are exclusive triable by Court of Sessions, the case was committed to the Sessions Court, Mehsana for trial, where it was numbered as Sessions Case No. 34/1988.

3. The charge at Exh.3 was framed by the Ld. Addl. Sessions Judge, Mehsana against the appellants and original accused no. 3 Amariben of the offences punishable under sections 302 and 307 read with sections 114 and 34 of the Indian Penal Code as well as section 135 (1) of the Bombay Police Act. Further the charge under section 323 of the Indian Penal Code was also framed against original accused no.3 Amariben. The charge was read over and explained to the appellants as well as original accused no. 3 Amariben, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore examined (1) complainant Kalubhai

Vashrambhai P.W.1 Exh.16, (2) injured Valabhai Vashrambhai P.W.2 Exh. 20, (3) injured Dharmaben Kalubhai P.W.3 Exh.22, (4) Dr. Rajesh Vrajlal Shah P.W.4 Exh.23, (5) injured Pravinkumar Valabhai Parmar P.W.5 Exh.34, (6) Ismail Suleman P.W.6 Exh.35, (7) Dr. Satish Madhusudan Pandya P.W.7 Exh. 38 (8) Dosanbhai Suleman P.W.8 Exh.44 (9) Rasulbhai Gulambhai Choudhari P.W.9 Exh.53, (10) Dr. Dipakkumar Devkaran Patel P.W.10 Exh. 58 and (11) Investigating Officer Parthibhai J. Choudhari P.W.11 Exh. 61 to prove its case against the appellants and original accused no. 3. The prosecution also produced documentary evidence such as complaint filed by Kalubhai Vashrambhai , post mortem notes of the deceased prepared by Dr. Rajesh Shah, injury certificates of witnesses Pravinbhai Valabhai, Dharmaben Kalubhai and Valabhai Vashrambhai, panchnamas of discovery of weapons, medical papers prepared by Dr. Satish Pandya as well as by Dr. Dipakkumar Patel, etc. in support of its case against appellants. After recording of the evidence of the prosecution witnesses was over, the Ld. Judge explained to the appellants as well as original accused no. 3 Amariben the circumstances which were appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure, 1973. In their further statements the appellants denied the case of the prosecution and claimed that they were falsely implicated in the case because of dispute relating to the field, however, neither the appellants nor original accused no. 3 Amariben examined any witness in support of their defence.

4. On appreciation of evidence adduced by the prosecution, the Ld. Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Vashrambhai Nathabhai Chamar had died a homicidal death, whereas injured Valabhai Vashrambhai had sustained serious injuries on his head which were likely to cause his death and had also sustained fractures on both the hands. The Ld. Judge further held that it was proved that injured Dharmaben and injured Pravinbhai Valabhai had also sustained injuries as stated in the medical certificates. The Ld. Judge referred to and relied upon the evidence of injured Dharmaben, injured Valabhai as well as injured Pravin Valabhai and held that the original accused no. 3 Amariben had caused simple injury to Dharmaben and had committed offence punishable under section 323 of the Indian Penal Code, whereas the appellant no. 1 had caused injury on the head of Valabhai Vashrambhai by means of an axe and appellant no.

2 had caused an injury on the right hand of Valabhai Vashrambhai which had resulted into fracture and, therefore, the appellants were liable to be convicted of the offence punishable under section 307 read with sections 114 and 34 of the Indian Penal Code. The Ld. Judge after placing reliance on the testimony of the injured witnesses, held that it was proved by the prosecution beyond reasonable doubt that the appellant no. 1 had caused injury on the head of the deceased Vashrambhai by means of an axe, whereas the appellant no. 2 had caused an injury on the head of the deceased by means of a stick and that the appellants were liable to be convicted of the offences punishable under section 302 read with sections 114 and 34 of the Indian Penal Code. The Ld. Judge further deduced that the appellants and original accused no. 3 Amariben had committed breach of notification issued u/S. 37 of the Bombay Police Act and, therefore, liable to be convicted u/S. 135 (1) of the Bombay Police Act. In view of the above referred to conclusions, the Ld. Judge has convicted the appellants of the offence punishable under sections 302 and 307 read with sections 114 and 34 of the Indian Penal Code as well as section 135(1) of the Bombay Police Act and imposed sentence, which is referred to earlier, by judgment dated January 25, 1993, giving rise to the present appeal.

5. Mr. D.F. Amin, the learned counsel for the appellants after taking us through the entire evidence on record submitted that complainant Kalubhai had not witnessed the incident in question at all and had learnt about the incident from his son Babubhai and, therefore, his testimony is of no assistance to the prosecution. The learned counsel for the appellants pleaded that the claim of Dharmaben that she had gone to her field at about 8.00 a.m. in the morning on the date of incident is not corroborated by evidence of other witnesses and as she is not a reliable witness and has suppressed the real incident, the Court should not rely upon her evidence for the purpose of convicting the appellants of the offences with which they were charged. According to the learned counsel, witness Dharmaben was not present at the time of the incident and as cause of the incident which is stated by her is found to be false, her evidence should be discarded while evaluating the evidence of prosecution witnesses against the appellants. Further it was pointed out that her evidence regarding she having been chased and injury to the deceased is not reliable because according to her she had become unconscious on receipt of injuries at the hands of original accused no. 3 Amariben and therefore, her evidence should be excluded while considering the case against the appellants. After

referring to the testimony of injured Valabhai Vashrambhai , the learned counsel urged that his evidence establishes that he has suppressed the real incident which had taken place and as his evidence is inconsistent with that of Dharmaben, his evidence should also not be relied upon by the Court. According to the learned counsel, Dharmaben in her evidence has stated that all the accused were following her, whereas injured witness Valabhai has stated that accused nos. 1 and 2 i.e. the present appellants were coming towards him and, therefore, his untrustworthy evidence should be rejected by the Court as not inspiring confidence. The learned counsel further submitted that it is evident from the deposition of injured witness Valabhai Vashrambhai that he has exaggerated the blows given to him as well as to the deceased and, therefore, it is not safe to rely upon his deposition for the purpose of convicting the appellants. After detailed reference to the testimony of child witness Pravinbhhai Valabhai, the learned counsel claimed that the child witness was tutored by his father and as his evidence is contradictory to the evidence of Dharmaben, his evidence should not be acted upon by the Court. The learned counsel contended that the medical evidence on record does not establish that injured Valabhai Vashrambhai had sustained fracture on his right hand and, therefore, even if it is held that evidence of Valabhai Vashrambhai can be acted upon for the injuries sustained by him, the appellant no. 2 could not have been convicted under section 307 of the Indian Penal Code with the aid of section 34 of Indian Penal Code and his conviction should be altered to one under Section 324 of the Indian Penal Code. The learned counsel pleaded that the medical evidence on record shows that the injuries sustained by the deceased were possible by two blows given with same weapon and, therefore, the appellant no. 2 could not have been convicted of the offence punishable under Section 302 read with sections 114 and 34 of the Indian Penal Code. What was claimed was that the appellant no. 1 had neither the intention to cause the death of the deceased nor the intention of causing such bodily injury which was sufficient in the ordinary course of nature to cause death nor had the knowledge that it was so eminently dangerous that the injury caused would in all probability cause the death of the deceased and, therefore, his conviction under Section 302 should be altered to one under Section 326 of the Indian Penal Code and the punishment imposed on him should be suitably modified. The learned counsel emphasized that the evidence on record has been misappreciated by the Ld. Judge and that the appeal should be allowed by reversing the impugned judgment.

6. Mr. K.G. Sheth, Ld. APP submitted that the presence of injured witnesses at the time of incident is hardly in doubt and, therefore, it is safe to act upon their depositions for the purpose of convicting the appellants of the offences with which they were charged. The Ld. APP for the State submitted that injured Dharmaben Kalubhai is not only supported by medical evidence on record regarding her injury, but is also corroborated by testimony of injured witness Valabhai Vashrambhai as well as injured Pravinkumar Valabhai Parmar and therefore, the Ld. Judge did not commit any error in placing reliance on her deposition for the purpose of believing the prosecution case. According to the learned counsel injured Dharmaben, injured Valabhai and injured Pravinkumar Valabhai being close relatives of deceased Vashrambhai would not allow the real culprits to go scot-free and would not involve the appellants in such a serious offence falsely when no enmity is established on the record of the case and, therefore, their testimony should be acted upon by the Court. What was stressed was that the injured witnesses have given the account of incident as they had seen and observed and even if some minor contradictions or exaggerations are found in their evidence, the same should be ignored, but the whole prosecution case should not be doubted by the Court. It was urged on behalf of the State that the evidence of injured eye witnesses establishes beyond reasonable doubt that the appellant no. 1 had inflicted blow with back portion of an axe on the head of the deceased, whereas the appellant no. 2 had inflicted stick blow on the head of the deceased and as the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause his death, the conviction of the appellants of the offences punishable u/S. 302 read with sec. 34 of the Indian Penal Code should be upheld. The learned counsel pleaded that the evidence on record and more particularly the evidence of injured Valabhai establishes that the appellant no. 1 had caused injury on head of Valabhai by means of an axe, whereas the appellant no. 2 had caused injury on the right hand of Valabhai, which had resulted into fracture and, therefore, the conviction of the appellants u/S. 307 read with section 34 of the Indian Penal Code being eminently just, should be confirmed by this Court. The learned counsel further pointed out that the evidence adduced by the prosecution is not only reliable but consistent as well as cogent and, therefore, the just conviction of the appellants recorded by the Ld. Judge of the trial Court should be upheld and the appeal filed by the appellants should be dismissed.

7. We have taken into consideration the submissions advanced at the bar and reappreciated the whole evidence on the record of the case.

8. The fact that deceased Vashrambhai Nathabhai Chamar died a homicidal death is not in dispute and is amply proved by the evidence on record. Dr. Rajesh Vrajlal Shah P.W.4 Exh.23, who had performed autopsy on the dead body of deceased, has stated in his evidence that on examination of dead body he had noticed C.L.W. on left frontal region having size of 1" as well as another C.L.W. on left parital region having size of 1". The doctor has further stated in his deposition that on internal examination he had found haematoma both on frontal as well a parital region and noticed depressed fracture of left frontal bone as well as multiple cracks. According to the doctor there was fracture of left parietal bone and fracture of roof plates of both eyes as well as fracture at the base of the skull. According to the medical officer the cause of death of the deceased was head injury. The injuries which were noticed by the doctor while performing post mortem examination of the dead body of the deceased, are also stated in post mortem notes produced on the record of the case at Exh.24. Further the injuries which were sustained by the deceased are also mentioned in detail in inquest report Exh. 47 which was prepared in presence of independent witnesses. There is no manner of doubt that the deceased had neither sustained accidental or suicidal injuries and had died because of the head injuries. Under the circumstances, the finding recorded by the Ld. Judge to the effect that it is proved beyond reasonable doubt that the deceased had died a homicidal death being borne out from the record of the case is hereby confirmed.

9. Dr. Rajesh Vrajlal Shah had also examined injured witness Valabhai on November 22, 1987 and had found C.L.W. on right parietal region of the size 2" x 1.1/2" and C.L.W. over right fora having the size of 0.5 cm. Further haematoma over left arm near elbow joint was found and according to the doctor, the injuries sustained by injured witness Valabhai were possible by hard and blunt substance. This witness has further stated that the injuries noticed by him on witness Valabhai were mentioned by him in certificate Exh. 27 and he had taken X-ray of the left hand right shoulder and skull of injured Valabhai. The witness has informed the Court that he had noticed crack on ulna near elbow joint. He admitted that the crack on the skull and on the ulna of right hand was not visible in X-ray plate and that

injured Valabhai Vashrambhai was transferred to Civil Hospital, Ahmedabad for further treatment. The witness further stated that when Valabhai Vashrambhai was brought before him for treatment, he was conscious and had informed him that he was assaulted by means of a stick. Regarding injuries of the deceased Dr. Shah in cross-examination stated that one blow with the same weapon could not have caused two different injuries on the head of the deceased, but two injuries by two blows with the same weapon were possible. The evidence of Dr. Satish Madhusudan Pandya P.W.7 Exh.38 shows that Valabhai Vashrambhai was brought before him with transfer note of Medical officer, Municipal Hospital, Sidhdhpur and that he had treated Valabhai on November 22, 1987. The doctor has stated in his deposition that he had found sutured wound on right side parietal region of 2.5 cm. length and X-ray showed fracture of medial epicondyle left side humorous as well as fracture of ulna right side. According to Dr. pandya the above referred to injuries were noticed when X-rays of injured Valabhai were taken in Orthopaedic Ward of the hospital. This doctor has further stated that Valabhai Vashrambhai was admitted in the hospital on November 22, 1987 and was discharged from the hospital on December 5, 1987 and that his superior officer had issued the certificate. The doctor further stated that all the three fractures sustained by Valabhai Vashrambhai were serious and the injury on head could have resulted into death if complications had arisen. During the cross-examination by the defence, Dr. Pandya stated that Dr. Radhani had issued certificate Exh.39 after looking to the OPD medical papers of the patient. The witness explained to the Court that in the OPD papers the fact that a patient had sustained fracture is not mentioned because that fact can be mentioned only after papers are received back either from the Orthopaedic Department or Surgery Department. The doctor further stated that no further particulars were available to him till Valabhai Vashrambhai was discharged from hospital so far as his injuries were concerned and that no cat-scan was performed to ascertain whether operation was necessary or not.

10. The evidence of Dipakkumar Devkarandas Patel, P.W. 10 Exh. 58 indicates that at the relevant time he was Assistant Professor of Neuro Surgery, Civil Hospital, Ahmedabad and that he had examined Valabhai Vashrambhai on November 22, 1987. According to him, he had found that the wound on right side parietal region was sutured one, whereas both his hands were plastered. This witness has further informed the Court that he had suspected fracture of the skull and, therefore, injured Valabhai

was referred to Radiologist who had taken his X-rays. The witness further stated in his evidence that linear fracture was detected above the ear on right parietal region and that Valabhai was not operated. The doctor produced medical papers of injured Valabhai at Exh.60. According to the doctor, the linear fracture sustained by injured Valabhai was possible by hard and blunt substance and that the injury was of such a serious nature that it was likely to cause his death. During his cross-examination the witness stated that he was not able to say as to by which weapon the wound which was sutured could have been caused. The doctor denied the suggestion that the injury on head was not serious and, therefore, operation on Valabhai was not performed. The witness also stated in his cross-examination that report of the Radiologist forms part of medical papers which he produced at Exh.60. The witness denied the suggestion that linear fracture is always a simple fracture and clarified that the fracture sustained by injured Valabhai was compound linear fracture. The witness also explained that as there was head injury and as there was linear fracture, he had mentioned in his examination-in-chief that death was possible because of the injuries sustained by Valabhai.

11. The discussion of medical evidence on record establishes that the injured Valabhai had sustained linear fracture on right side parietal region as well as fracture on right hand as well as left hand and that the injury sustained by him on head was serious and was likely to cause his death.

12. The evidence of Dr. Rajesh Shah, P.W.4 Exh.23 further shows that on November 22, 1987 he was discharging duties as Medical officer at Sidhdhpur Municipal Hospital and had examined Pravinkumar Valabhai. According to the doctor, Pravinkumar was complaining about pain below elbow of right hand and that the injury sustained by him was possible either by a stick or by any hard and blunt substance. The witness produced certificate of injury relating to Pravinkumar Valabhai, which shows that there was tenderness over right fora and injury was possible by blunt instrument. This doctor has further stated that on November 22, 1987 he had also examined injured Dharmaben Kalubhai and had found abrasion near dorsal aspect of left ring finger having size of 0.5 cm. The doctor further informed the Court that he had also found tenderness around left shoulder joint of Dharmaben and that the injuries were possible by blunt instrument. In cross-examination by defence Dr. Shah stated that the injuries sustained by Dharmaben were

simple in nature and were possible by a fall. Similarly regarding injuries sustained by Pravinkumar Valabhai also the witness in cross-examination stated that his injuries were also simple and were possible by a fall. The discussion of medical evidence on record therefore, establishes that injured Dharmaben and injured Pravinkumar had also sustained simple injuries.

13. This brings us to the question of consideration of evidence of eye witnesses. Injured witness Valabhai Vashrambhai P.W.2 Exh.20 in his examination-in-chief has stated that at the time of incident he was at his field, whereas his sister-in-law Dharmaben, his daughters Kesar and Menaben as well as his son Pravinkumar and son of his brother were present in the field, where the incident had taken place. The witness has informed the Court that his field is known as Dhedhvala field and that a sloping water course in the field for watering crops was made from the well of Rabari Jivan Jorabhai situated in Jivan's field, which was breached by the appellant no.1. The witness has claimed that therefore sloping water course in their field for watering crops was provided from the field of Muman Husenbhai Sulemanbhai. According to this witness, when water was flowing through the sloping water course into their field, the original accused no. 3 i.e. Amariben had diverted the water into her field and, therefore, his sister-in-law Dharmaben had tried to plug the breach but at that time the original accused no. 3 had given blow with shovel on waist of Dharmaben. The witness has further stated that when original accused no. 3 Amariben had aimed another blow at Dharmaben, Dharmaben had tried to ward it off and, therefore, the blow had fallen on finger of left hand of Dharmaben. The witness has further stated before the Court that at that time he had rushed to rescue Dharmaben, who was chased by the appellants and juvenile offender and on seeing him, the appellants and juvenile accused were agitated. The witness has specifically stated before the Court that appellant no. 1 had given blow on his head by means of an axe, whereas appellant no. 2 had given blow with stick on his right hand and the juvenile offender had given blow with his stick on left hand. The witness has further informed the Court that at that time his deceased father had come to his rescue and the appellant no. 1 had given blow with an axe on the head of his father, whereas the appellant no. 2 had given blow with stick on the head of his father. The witness has stated that on receiving injuries he had fallen on the ground and had become unconscious and was not knowing as to what happened thereafter. In his cross-examination by the defence the witness denied the

suggestion that he had not witnessed the incident in question. The witness admitted that the field was partitioned between him and his brothers and that the field situated on east was being cultivated by his father. The witness also stated in his cross-examination that from his house he had straight way gone to his field at about 7.00 a.m. in the morning and that he was not knowing as to when his brother Kalubhai had gone to his field. The witness has explained that after the large mustard crop was watered in the field of Kalubhai, the accused no. 1 i.e. Amariben was entitled to use the water for watering crops standing in her field. The witness has stated that when he was rushing towards Dharmaben, Dharmaben was coming towards him and the distance between him and her was hardly 3 ft. to 5 ft. According to this witness, the quarrel took place because original accused no. 3 Amariben had breached the sloping water course. The witness further specifically stated in his cross-examination that first of all his sister-in-law Dharmaben was assaulted, thereafter he was assaulted and thereafter his father Vashrambhai Nathabhai was assaulted by the appellants and others.

14. The evidence of witness Dharmaben Kalubhai P.W.3 Exh.22 shows that on the date of incident she had gone to her field between 7.00 a.m. to 8.00 a.m. and that injured Valabhai and son of Valabhai named Pravin were also in the field. The witness has stated that thereafter her father-in-law had come and that large mustard crop was required to be watered. The witness has stated that initially the sloping water course was passing from the field of the appellant no.1, but that was breached and, therefore, they had made another sloping water course from the well of Muman Husenbhai Sulemanbhai for the purpose of taking water. According to this witness, the appellants were also using the water from the well of Muman Husenbhai Sulemanbhai for their field. The witness has stated that on the date of incident the water was flowing in her field through the sloping water course and original accused no. 3 Amariben had breached the same and when she had made attempt to plug the breach, she was assaulted by Amariben with a shovel and caused an injury on her waist. According to this witness, Amariben had tried to inflict another blow with shovel and as she had tried to ward it off, fingers of her left hand were injured. The witness has specifically stated that in order to save herself she had started running towards her brother-in-law i.e. Valabhai Vashrambhai and she was chased by the appellants at that time. According to this witness when Valabhai tried to save her, the appellant no. 1 had caused injury on head

of Valabhai by means of an axe, whereas the appellant no. 2 had caused injury by giving stick blow on head of Valabhai and Ramesh Kanajibhai who was juvenile offender had caused injury on the left hand of Valabhai. The witness has further informed the Court that thereupon the deceased had tried to rescue Valabhai and therefore the appellant no. 1 had caused injury on the head of deceased by means of an axe, whereas appellant no. 2 had caused injury on the head of the deceased with the stick which he was having and that the deceased had died on the spot. During cross-examination the witness stated that she had started running towards east of the field and that she was chased not only by the original accused no. 3 Amariben, but also by appellants and juvenile offender. The witness has informed the Court that her clothes were blood stained, but she had not paid much attention as her father-in-law had expired in the incident. Again in cross-examination the witness maintained that first of all she was assaulted and thereafter her brother-in-law was assaulted and thereafter her father-in-law was assaulted by the appellants and others. A question was put to her as to whether she was with the dead body of her father-in-law or not and she stated that she was not sitting by the side of the dead body of her father-in-law.

15. Witness Pravinkumar Valabhai Parmar is a child witness. Before discussing the evidence of child witness Pravinkumar, it would be advantageous to refer to law relating to child witness. Section 118 of the Evidence Act deals with the question of competency of persons to testify. Under this section all persons are competent to testify, unless they are, in the opinion of the Court (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of his age. A child of tender years is not, by reason of his youth, as a matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to section 118 of the Evidence Act, a child of tender age is a competent witness if it appears that it can understand the questions put to it and give rational answers thereto. This section vests in the Court the discretion to decide

whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take is to satisfy himself that the child is the competent witness within the meaning of Section 118 of the Evidence Act and for this purpose preliminary inquiry should be held. It is the duty of the Court to ascertain in the best way, which it can, whether from the extent of his intellectual capacity and understanding the child witness is able to give a rational account of what he has seen, heard or done at a particular occasion or in other words the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. However, absence of recording of such an opinion does not make evidence of a child witness inadmissible. Opinion of the Court in this behalf can be gathered by the Appellate Court from circumstances appearing in the case if there is no certificate by the learned Trial Judge. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in the positive, the Court will not, as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth.

In the case of Mohamed Sugal Esa Mamasan Rer Alalah v/s. The King, A.I.R. 1946 Privy Council, 3, it is held as under:-

"In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But, in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by stattute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

16. Having noticed the principles, we would now discuss the evidence of child witness Pravinkumar. His evidence before the Court was recorded on June 16, 1992. The Ld. Judge in order to satisfy himself that the child witness understood the duty to tell truth and was in a position to give rational answers, put certain questions to him. The Ld. Judge tried to know from the child witness as to who were present in the Court room and what is Court, etc. The Ld. Judge has made a note that the child witness had understood the questions well and had given satisfactory answers to the questions put to him. In the note the Ld. Judge has also remarked that the child witness had capacity to understand the questions put to him and, therefore, the Ld. Judge recorded his deposition after administering oath to him. This witness in his examination-in-chief has stated that the incident had taken place before 5 to 6 years and that at the time of incident he alongwith his aunt Dharmaben and grand father Vashrambhai were present in the field. According to him his uncle Valabhai was at a short distance from them and that they were receiving the water from the bore of Jivanbhai. According to this witness the sloping water course made by his uncle near the boundary of the field of appellant no. 1 was breached by the appellant no. 1 and that another sloping water course was prepared from the field of Muman. The witness has informed the Court that original accuse no. 3 Amariben had breached the said sloping water course and, therefore, his aunt Dharmaben had tried to plug the said breach and that Amariben had given blow with shovel to Dharmaben on her hands. The witness has informed the Court that Amariben had aimed second blow which was tried to be ward off by

Dharmaben and therefore, Dharmaben had received injuries on her fingers. The witness has specifically stated that his uncle Valabhai had tried to save Dharmaben from further assault and at that time the appellant no. 1 had given blow with an axe on head of Valabhai, whereas appellant no. 2 had given blow with stick on left hand of Valabhai. The witness has stated that thereupon his grand father Vashrambhai had tried to save his uncle Valabhai and, therefore, the appellant no. 1 had given blow with an axe on the head of deceased, whereas appellant no. 2 had given blow on the right hand of the deceased by means of a stick. The witness has stated that the appellant no. 2 had given a stick blow on his right hand. According to this witness, his grand father had expired on the spot and injured persons including himself were removed to Sidhdhpur Government dispensary, where he was treated by the doctor. The witness also stated that Valabhai Vashrambhai had sustained serious injuries and, therefore, he was removed to Government Hospital, Ahmedabad. The witness informed the Court that he had come to the Court with his father Valabhai Vashrambhai in a jeep and that he was stating about the incident for the first time before the Court. Further in cross-examination the witness stated that he had left his house at about 8.00 a.m. for the purpose of going to the field and that he was accompanied by his aunt Dharmaben and grand father Vashrambhai Nathabhai. The witness also stated in his cross-examination that the incident had taken place at about 8.00 a.m. in the field of his grand father and near the field of appellant no.1. The witness further stated that the incident in question had taken place as soon as they had gone to their field. The witness claimed that he was at a distance of 3 to 4 ft. when his aunt Dharmaben was assaulted with shovel by original accused no. 3 Amariben and that his father Valabhai Vashrambhai as well as his grand father Vashrambhai Nathabhai were also present. Again in the cross-examination the witness asserted that when Dharmaben was being beaten, his father Valabhai Vashrambhai had tried to rescue and as his father was beaten, his grand father had tried to rescue his father and therefore, the appellants and others had beaten his grand father. According to the witness the incident had continued for two minutes and that the blood stained earth was collected by Police Sub Inspector. The witness has also stated in his evidence that he had suffered pain because of blow received by him on his hands and as he had shouted, people from the neighbourhood had collected at the place of incident . Above referred to discussion of all the three eye witnesses makes it evident that first of all original accused no. 3 Amariben had

assaulted Dharmaben and while injured Valabhai had tried to rescue Dharmaben, he was assaulted by the appellants and when deceased Vashrambhai had tried to rescue injured Valabhai, he was also assaulted by the appellants and others. The principle regarding appreciation of evidence of a witness in criminal trial is laid down by the Supreme Court in several reported decisions. However, it would be relevant to refer to the principle enunciated by the Supreme Court in State of U.P. v/s. M.K. Anthony reported in AIR 1985 S.C. 48. According to the Supreme Court while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring or truth and once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. According to the Supreme Court, minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. What is laid down by the Supreme Court is that if the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Further it is emphasized by the Supreme Court therein that even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. The Supreme Court in State of U.P. v/s. Shankar AIR 1981 S.C. 897 has held that in this country it is rare to come across the testimony of witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. The Supreme Court has held that it is the function of the Court to separate the grain from the chaff and accept what appears to be true and reject the rest.

17. Applying the above referred to principles laid

down by the Supreme Court to the facts of the present case, we find that all the three eye witnesses have consistently stated before the Court that first of all Dharmaben was assaulted by shovel by original accused no. 3 Amariben when she had made an attempt to plug the breach caused by Amariben to sloping water course and that when she had attempted to ward off another blow with shovel, she had received injuries on fingers of her left hand. Their evidence further shows that thereafter she had started running towards the place where Valabhai was standing and Valabhai in order to save her was running towards Dharmaben and had seen that she was being chased by the appellants and others. The prosecution evidence unerringly establishes that thereupon appellant no. 1 had caused injury with an axe on the head of Valabhai, whereas appellant no. 2 had caused injury on the right hand of Valabhai which had resulted into fracture. Further the evidence of all the prosecution witnesses establishes that thereupon the deceased had tried to save his son Valabhai and at that time the appellant no. 1 had inflicted blow with an axe on his head, whereas appellant no. 2 had caused injury with a stick on his head, as a result of which he had died on the spot. We may state that no major contradictions have been brought on the record of the case so as to reject the version narrated by the eye witnesses. The discrepancy in evidence regarding injury caused by the appellant no. 2 to injured Valabhai or the discrepancy in evidence of child witness regarding injury caused by the appellant to the deceased are due different powers of the observation, retention and reproduction of the witnesses. However, the prosecution case cannot be overthrown on such minor contradictions. In fact discrepancy appearing in the evidence of child witness suggests that he was not tutored otherwise such discrepancy would not have appeared at all. Further it is well to remember that the injured witnesses are closely related to the deceased and, therefore, would not allow the real culprits to go scot-free and would not involve the appellants falsely in such a serious case, more particularly when no enmity is suggested to any of the eye witnesses which would prompt them to involve the appellants falsely in such a serious case. It is true that Dharmaben and witness Valabhai have stated that the injuries sustained by them were so serious that they had become unconscious. However, this embellishment in their evidence is made because of the fear of being disbelieved by the Court. The main case of the prosecution that the appellants had caused injuries to the witnesses and also to the deceased is satisfactorily proved and, therefore, in our view the Ld. Judge did not commit any error in placing reliance on the

sworn testimony of the injured witnesses for the purpose of convicting the appellants. We may state that not only the evidence of one injured eye witness stands corroborated by sworn testimony of another injured witness, but all the injured eye witnesses stand corroborated by the medical evidence on record regarding giving of blows to them as well as to the deceased and, therefore, it is safe to rely upon their evidence. Therefore, no benefit can be given to the appellants merely because some minor contradictions which are inconsequential in nature appear in their evidence.

18. This brings us to the question as to the nature of offence committed by the appellants. The sequence of events would indicate that first of all Dharmaben was assaulted by the original accused no. 3 with shovel and was injured. Thereupon injured Valabhai had tried to rescue Dharmaben from being further assaulted and thereupon appellant no. 1 had caused injury on his head by means of an axe, whereas appellant no. 2 had caused an injury which resulted into fracture of his right hand. The evidence further shows that thereupon Vashrambhai had tried to rescue his son injured Valabhai and appellant no. 1 had given blow with an axe on his head, whereas appellant no. 2 had given blow with stick on the deceased, as a result of which deceased Vashrambhai had died on the spot. The evidence of Dipakkumar P.W. 10 Exh. 58 clearly establishes beyond reasonable doubt that the injury sustained by injured Valabhai was serious and likely to cause his death. Therefore there is no manner of doubt that offence punishable u/S. 307 is made out against the appellant no.1. The evidence of Dr. Rajesh Shah P.W.4, Exh.23, who had performed autopsy on the dead body of the deceased clearly establishes that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause his death. Therefore, in our view the Ld. Judge did not commit any error in convicting the appellants of the offences punishable u/S. 302 read with sec. 34 of the Indian Penal Code. It is not the case of the appellants that injury on the head of the deceased or injury on the head of injured Valabhai were accidental nor it is the case of the appellants that blow was aimed on some other part of the body of either deceased or injured Valabhai and because of supervention caused like sudden intervention or movement of the deceased or injured Valabhai that the blow struck on the head. Therefore, it is safe to conclude that intention of the appellants was to cause those very injuries which are found by the Medical officer on the body of the deceased and injured Valabhai. As the medical evidence shows that the injury sustained by injured Valabhai was

serious and likely to cause his death and that the injuries sustained by the deceased were sufficient in ordinary course of nature to cause his death, the offence under Section 307 so far as injured Valabhai is concerned and offence under Section 302 so far as the deceased is concerned, is established. The contention that appellant no. 2 had no intention to cause the death of the deceased nor intention to cause serious injury on the head of injured Valabhai, which was likely to cause death and, therefore, he could not have been convicted with the aid of section 34 of the Indian Penal Code has no substance. As observed earlier, the evidence of Dharmaben indicates that after she was assaulted by original accused no. 3 Amariben, she had started running towards Valabhai and at that time she was being chased by the appellants and others. The evidence further indicates that when Valabhai had tried to rescue Dharmaben, appellant no. 1 had given blow with an axe on the head of Valabhai, whereas appellant no. 2 had caused injury on the hand of Valabhai, which had resulted into fracture. Further the evidence shows that when the assault was being mounted on Valabhai, deceased Vashrambhai had tried to save his son from assault and thereupon the appellant no. 1 had given blow with an axe on the head of the deceased, whereas appellant no. 2 had given blow with stick on the head of the deceased. Thus, the evidence on record shows that appellant no. 2 had shared the intention of the appellant no.1 right from the beginning and is rightly convicted of the offences punishable under Sections 302 and 307 read with section 34 of the Indian Penal Code. We may state that so far as original accused no. 3 is concerned, the evidence on record does not establish that after causing injury to Dharmaben, she had either assaulted injured Valabhai or injured Pravin or the deceased and, therefore, her conviction under Section 323 of the Indian Penal Code, which is recorded by the Ld. Judge and which is not challenged by the State, deserves to be upheld. As far as conviction of the appellants u/S. 135(1) of Bombay Police Act is concerned, we find that the prosecution has not produced notification issued u/S. 37 (1) of the Act and therefore it cannot be sustained.

19. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellants of the offences punishable u/Ss. 302, 307 read with sections 114 and 34 of Indian Penal Code as well as sentence imposed is hereby maintained. The conviction of the appellants of the offence punishable u/S. 135(1) of the Act is set aside.

The Muddamal be disposed of in terms of the

direction given by the Ld. Judge in the impugned judgment.

20. At this stage, the learned counsel for the appellants prays that in view of the time gap between the order dated September 9, 1993, by which the appellant no. 2 is released on bail and the date of hearing of the appeal, reasonable time be granted to appellant no. 2 to surrender to the Jail Authority.

Having regard to the facts and circumstances of the case, the appellant no. 2 is directed to surrender to the Jail Authorities on or before 30/11/2001.

[J.M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.